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Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1998

RICHARDO RODRIGUEZ , et.al.,

Petitioners,

-VS-

DRAMESE FAIR, a minor, by and through his mother and next friend, Sandra Foy,

Respondent.

On petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Procedural history

Respondent, Dramese Fair, an eleven year-old boy, suffered serious psychological harm as a result of the unconstitutional actions and excessive force of the petitioner police officers. Respondent sued. The district court properly denied petitioner's motion to dismiss on grounds of qualified immunity. The court found that material facts existed as to whether the police officers violated the respondent's Fourth Amendment rights. Petitioners then appealed this ruling to the Second Circuit Court of Appeals. In a Summary Order, the Court of Appeals dismissed the appeal for lack of jurisdiction. It held the petitioners could not appeal the district court's denial of summary judgment because its decision regarding qualified immunity was premised on the finding that material facts remained in dispute.

B. Facts of the incident in question

On June 13, 1993, the day of the incident, respondent Dramese Fair lived with his mother, Sandra Foy, and his nine year-old sister in the South Street Housing Project in New Haven, Connecticut. On that day, respondent's younger sister ran into the apartment crying about an injury she had sustained from a neighborhood scuffle. (March 22, 1994, Dep. Dramese Fair). Nadia, a neighborhood girl, had hurled and struck the respondent's sister with a rock aimed at her forehead. Upon seeing her daughter's injury, Ms. Foy immediately left the house to locate Nadia and her mother who were attending a local church. Dramese followed his mother. When Ms. Foy located Nadia and her mother, she attempted to discuss the young girl's actions against her daughter. During the ensuing conversation, Ms. Foy perceived Nadia as insolent and struck her on the neck. Dramese then hit Nadia on her back and leg with the stick he was carrying. Nadia did not cry or sustain injury. However, she and her mother filed a complaint at the New Haven Police Department. (May 22, 1994, Dep. Richardo Rodriguez). Following the minor incident with Nadia and her mother, Ms. Foy returned home with her son. She then left to attend church. Dramese remained at home with an adult caretaker named Tracy Daniels. (March 22, 1994, Dep.

Dramese Fair). While Ms. Daniels remained inside, Dramese sat on the outside steps in his pajamas, without shoes, and began to hit the railing with the stick. (March 22, 1994, Dep. Dramese Fair).

In response to the initial complaint filed at the police department, Officer Richardo Rodriguez requested backup from Officer John Velleca and proceeded to the South Street Housing Project. (May 22, 1994, Dep. Richardo Rodriguez). Officer Velleca followed Officer Rodriguez in a separate police vehicle. During this time, Nadia sat in the passenger seat of Officer Rodriguez's car. When the officers and Nadia arrived at the housing project, Dramese sat on the front porch of his apartment, wearing pajamas and socks. He was making "zorro" signs in the air and swinging the stick against the railing. (October 19, 1994, Video Tape Dep. Dramese Fair; May 22, 1994, Dep. Richardo Rodriguez). Nadia then identified Dramese as the boy who struck her with the stick earlier that morning. (May 22, 1994, Dep. Richardo Rodriguez).

Initially, Officer Rodriguez exited the vehicle and confiscated the young boy's stick. (May 2, 1994, Dep. John Velleca). Then, both officers asked Dramese where his mother was. Dramese responded by saying that he did not know. The officers then asked Dramese for his name and for the name of the person watching him. (March 22, 1994, Dep. Dramese Fair). Dramese replied that he did not know. The police officer also asked him if he knew why the police came to his home. He responded affirmatively to hitting Nadia with a stick. (October 19, 1994, Video Tape Dep. Dramese Fair). Officer Velleca then placed Dramese in the back of Officer Rodriguez's police car. (May 2, 1994, Dep. John Velleca). Officer Velleca remained beside the police cruiser. Children ages three, five and ten who were playing in a nearby field also observed the police and their actions.

Once locked in the back of the police cruiser, Dramese was unarmed, subdued, and unable to escape or to provide resistance. He did not pose a threat to himself or to others. Petitioners did not explain to or discuss with Dramese what was going to happen to him. Later, the petitioners opened the rear door of the cruiser and handcuffed him to prevent him from allegedly "fumbling" through a briefcase. (May 2, 1994, Dep. John Velleca). Consequently, Dramese believed that he was being taken to juvenile detention and

that he would never see his mother again. (October 19, 1994, Video Tape Dep. Dramese Fair). He was terrified and began to cry. (March 22, 1994, Deposition of Dramese Fair).

Following this incident, Tracey Daniels came out of the apartment and spoke to Officer Rodriguez. When the police asked for the location of Dramese's mother, Ms. Daniels replied that she did not know Ms. Foy's whereabouts. Ms. Daniels approached Dramese in the police car and requested the location of his mother. Dramese informed her that his mother had gone to church. (October 19, 1994, Video Tape Dep. Dramese Fair). Ms. Daniels offered to watch the young boy inside the house while the police officers drove to the church. The police declined and elected to take Dramese with them in the police car in order to locate his mother.

On the way to the church, Dramese cried and complained about the tightness of the handcuffs. Officer Rodriguez told him to "shut up" and briefly told him why he was in the police car. (March 22, 1994, Dep. Dramese Fair). At this point, Officer Rodriguez briefly discussed why he removed Dramese from his home. When the police arrived at the church, they quickly located Sandra Foy and brought her outside. Ms. Foy immediately noticed her child crying in the backseat of the police car and demanded to know why the police had handcuffed her son. The police removed the handcuffs. The officers then drove Dramese and his mother to the police substation located at their housing project. (October 19, 1994, Video Tape Dep. Dramese Fair; March 22, 1994, Dep. Dramese Fair) The police charged Ms. Foy with Breach of Peace. They referred both Nadia and Dramese to the Juvenile authorities. However, the charges against both Ms. Foy and Dramese were dismissed.

On January 31, 1994, respondent filed a § 1983 and § 1981 complaint against the petitioners. Since the local time rule for summary judgement had expired, the district court, in its discretion, allowed the petitioners to file a Motion in Limine based on qualified immunity on November 13, 1996, without objection from respondent. In a Margin Order, the district court denied petitioners' Motion in Limine on January 30, 1997. It held:

> The inferences drawn from the facts in the deposition excerpts submitted to the Court, viewed most favorably to the plaintiff, could demonstrate that plaintiff took no evasive or hostile actions, and that no circumstances between the time plaintiff was placed in the police vehicle uncuffed and the time he was handcuffed. Thus, a factual determination is necessary at trial to determine the totality of the circumstances under which the objective reasonableness of the defendant police officers' actions in handcuffing plaintiff must be assessed.

(Margin Order, denying Motion in Limine, dated January 30, 1997).

Petitioners then filed a Motion for Reconsideration on January 31, 1997. In elaborating on the Margin Order, the district court noted that

> . . .[M]aterial facts here are disputed: whether the underlying offense was violent or not, plaintiff's conduct prior to, during and after being placed into the police cruiser, the existence of any fight or flight manifestation by plaintiff at anytime, or any attempted escape assistance by other children outside the cruiser, and plaintiff's conduct while inside the cruiser claimed to require the placement of handcuffs on him.
>
> Taking the inferences most favorable to plaintiff's version in deposition, he was a small, pajama-clad, shoeless [eleven] year-old boy, sitting on the porch of his home, who made no effort to resist or flee from police at any time, and who sat in the cruiser, silent and hands together in his lap, crying after the police entered the cruiser and handcuffed him. . . . [T]he Court concluded that a reasonable trier of fact could find that the defendants' actions were objectively unreasonable. The force used by defendants under the totality of the circumstances

> posited by the plaintiff cannot be said to be objectively reasonable as a matter of law. Thus, plaintiff's claim of deprivation of his constitutional right to be free from excessive force must advance to trial.

(Order denying Motion for Reconsideration, February 5, 1997).

Following this decision, the petitioners appealed to the Second Circuit Court of Appeals and asserted that qualified immunity is appropriate where the undisputed facts fail to prove a violation of clearly established law. In a Summary Order, the Second Circuit dismissed the petitioners' claim for lack of jurisdiction because of the district court's determination that genuine issues of material fact remained in dispute.

REASONS FOR DENYING THE WRIT

1. The Second Circuit correctly held that it did not have jurisdiction to hear petitioners' appeal.

Petitioners contend that their appeal relates to whether the law governing the use of excessive force is clearly established. (Pet. Brief 16). However, this is not the petitioners' real aim. Under the guise of whether the law is clearly established, the petitioners seek to have this Court actually review the merits of the claim, and thus become a trier of fact. Indeed, the Second Circuit decision held that genuine issues of material facts remained in dispute, and thus, this decision is not appealable immediately. Therefore, this Court should not grant certiorari because the petitioners raise issues which do not exist separately from the merits of respondent's claim. The petitioners' case presents claims over which appellate judges enjoy no comparative expertise; it risks delay and is an unwise use of judicial time. Johnson v. Jones, 515 U.S. 304, 313-317 (1995).

The law of excessive force, as discussed infra, is clearly established as a fact-based inquiry into the totality of circumstances surrounding the use of force. Graham v. Connor, 490 U.S. 386 (1989). In this case, petitioners seek a review of the

district court's finding of material facts which directly relate to the determination of clearly established law. Furthermore, petitioners request a review of the merits of respondent's claim, namely, whether the facts as alleged provide evidence of an unreasonable use of force. However, a denial of summary judgement is not immediately appealable in that it rests on a finding that certain material facts are in dispute. Johnson, 515 U.S. at 313-314; Genas v. State of New York Dept. of Correctional Services, 75 F.3d 825, 830 (2d Cir. 1996). First, as the case law cited by petitioners holds, appealability does not turn on the strength of the argument, but the nature of the original order. Behrens v. Pelletier, 516 U.S. 299 (1996). Second, implicit in the brief Summary Order of the Second Circuit is that the law of excessive force is clearly established. The court elected not to review the case law in the Order because it was clearly established.

This Court has held that denials of summary judgment are not appealable immediately because they do not present issues sufficiently separate from the merits of respondent's claim. The district court in this case held that

> [M]aterial facts here are disputed . . . . Taking inferences most favorable to plaintiff . . . he was a small, pajama-clad, shoeless twelve year-old boy, sitting on the porch of his home, who willingly gave police his stick on their request . . . who made no effort to resist or flee from police at any time, and who sat in the cruiser, silent and hands together in his lap, crying after the police entered the cruiser and handcuffed him.

By seeking certiorari on the appealability of a case with material facts in dispute, petitioners essentially have asked this Court to canvass the factual record to determine whether the police officers conduct violated clearly established law. This case does not present the "neat, abstract issue of law" envisioned in Johnson. Johnson, 515 U.S. at 317 (citation omitted).

An immediately appealable denial of qualified immunity is "a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case." Id. at

313. Despite assurances otherwise, petitioners appeal the very heart of the excessive force inquiry, namely, whether the force was reasonable. However, "a claim of immunity [should] raise a question that is significantly different from the questions underlying plaintiff's claim on the merits (i.e., in the absence of qualified immunity)." Id. at 314. It is difficult to find a "separate" legal question when it is not "significantly different from the fact-related legal issues that . . . underlie the plaintiff's claims on the merits." Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

At best, petitioners' argument on appeal is that the facts in dispute are not material to the excessive force issue. However, the Second Circuit has held that

> [W]hen a district judge finds that a factual dispute exists, which is sufficiently material to take a case to the jury, an appellate court should not review even the legal issue of whether this finding of a factual dispute was correct.

Genas, 75 F.3d at 830 (denials of summary judgment such as whether plaintiff's facts support claim of violation of clearly established law still applicable). As recognized even by the petitioners, when there are disputed issues of material fact which might impact the Court's determination of a claim of qualified immunity, special factual interrogatories may be submitted to the jury. Hunter v. Bryant, 502 U.S. 224 (1991); Lennon v. Miller, 66 F.3d 416 (2d Cir. 1995). (Pet. Brief, 13). These cases emphasize the fact that courts should allow juries to review qualified immunity claims where material facts remain in dispute.

Thus, when trial courts determine that genuine issues of fact are material and sufficient to take the case to trial, appellate courts should not entertain an appeal immediately because trial judges, rather than appellate judges, confront these issues on a daily basis. Johnson, 515 U.S. at 315. Furthermore, immediate appeal of the order in this case is unlikely to "bring important error-correcting benefits." Id. Allowing review at this stage also risks delay because "factual controversies . . . may seem nebulous . . . . Requir[ing] reading a vast pretrial record, with numerous

conflicting affidavits, depositions, and other discovery materials." Id. at 316. Finally, allowing an appeal at this stage "makes unwise use of appellate courts' time by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision." Id. at 317. Such a review contradicts goals of judicial efficiency.

2. Qualified immunity does not protect police officers when they unlawfully use excessive force to restrain an eleven year-old child who did not pose a flight or safety risk.

Petitioners argue that the right of an eleven year-old juvenile to remain free from handcuffing during a lawful arrest is not clearly established. (Pet. Brief 25-38). Respondent is not required to present case law holding the specific facts and subsequent actions in question as unlawful. Petitioners also argue that respondent's case asks that the trial judge, the Second Circuit, and this Court change existing and established law. On the contrary, respondent requests that this Court follow the standard set in Graham and does not seek a special right for all juveniles subject to arrest. Petitioners now challenge the district court for having followed the holdings of this Court. In fact, they have asked the Court to ignore current legal precedent and create new law. This Court has long held that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." Bell v. Wolfish, 441 U.S. 520, 559 (1979). Petitioners would have the Court create an absolute zone of police discretion with regard to handcuffing. They request, therefore, a rule capable only of mechanical application. The Court should resist this request and adhere to the objective reasonableness standard that preserves the proper balance between the rights of individuals and the legitimate interests of law enforcement.

In order for a plaintiff's claim to survive a defense of qualified immunity, it must allege the violation of a clearly established statutory or constitutional right. See, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). This right is clearly

established when "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). However, courts do not have to have previously held a particular action as unlawful in order for plaintiffs to prove that an official violated a clearly established law.[1] Id. See also, Finnegan v. Fountain, 915 F.2d 817, 823 (2d Cir. 1990) (refusing to hold that act violates clearly established right only if "factually identical action has been previously held unlawful.").

Courts have ruled consistently that the right to be free from excessive force is clearly established as a general right, requiring that all claims receive adjudication under the objective reasonableness standard set by Graham. See, e.g., Martin v. Heideman, 106 F.3d 1308 (6th Cir. 1997); Soares v. Connecticut, 8 F.3d 917 (2d Cir. 1993). The Graham objective reasonableness standard provides that the trial court must consider the totality of the circumstances when assessing an officer's actions and applied force in a particular instance. Graham, 490 U.S. at 396 (citing Tennessee v. Garner, 471 U.S. 1, 8-9 (1968). This totality of circumstances approach includes a court's determination of "the

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1. Indeed, as argued by Linda Ross Meyer, such a mechanical definition would allow defendants to remove all possible claims because of an overgeneralized standard:

> If one takes the view that officers do not have adequate notice of what constitutes reasonable force until a court has articulated the standard in a particular factual setting, the law is indeterminate until a case articulates the standard at an appropriate level of generality, regardless of whether a "reasonable" officer would have thought the force excessive.

Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. Rev. 1467, 1516 (1996). See also Kelly v. Borg, 60 F.3d 664, 667 (9th Cir. 1995) (noting that "[t]o . . . define the right at issue more narrowly . . . would be to allow Appellants, and future defendants, to define away all potential claims.").

severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. This approach also requires that the reasonableness of a specific use of force "be judged from the perspective of a reasonable police officer on the scene." Id.

In this case, the district court ruled that disputed material facts exist and if adjudicated favorably for respondent would not entitle petitioners to qualified immunity as a matter of law. These facts include: eleven year-old Dramese was "small" and "pajama-clad" at the time of the arrest; he willingly surrendered the stick with which he had been playing; and he made no effort to resist arrest or to flee from the police cruiser where he sat subdued prior to the handcuffing. After being handcuffed, Dramese remained in the back of the police cruiser. He sat motionless and crying. (Memorandum Endorsement Rule on Defs. Motion for Reconsideration, filed February 6, 1997) Petitioners further admitted that once they initially placed Dramese in the back of the police cruiser, prior to handcuffing, they did not consider Dramese to be a flight safety risk. (March 22, 1994, Dep. Richardo Rodriguez; May 2, 1994, Dep. John Velleca). Nevertheless, they handcuffed him with his hands behind his back. (March 22, 1994, Dep. John Velleca). Finally, the police neither informed him of his rights nor of what would happen to him as the police car drove him away from his home.

Under this set of facts, the district court concluded that the petitioners' actions could be found unreasonable as a matter of law. Consistent with Graham, the district court ruled that "plaintiff's pre-adolescent age, small size, claimed lack of sophistication and guilelessness, and youth, are all factors which must be considered as part of the totality of the circumstances facing the officers at the time." (Memorandum Endorsement, supra.). This ruling by the district court did not make new law, but merely applied the objective reasonableness standard of Graham to the facts of this case.

Petitioners argue that because neither the trial court nor the Second Circuit cited to a case specifically holding that the handcuffing of a child by police officers is either prohibited or constitutionally constrained, this Court should grant certiorari. No

citation, however, is necessary. The respondent in this case does not claim a special right. In Martin v. Heideman, the Sixth Circuit reversed summary judgment for defendant police officers on a claim of "excessively forceful handcuffing" because it concluded that handcuffing claims should be adjudicated under the general rubric of excessive force. Martin, 106 F.3d at 1313. Even though the plaintiff Martin was an adult arrested for fraudulently staging a dangerous car accident and the injuries sustained to his hands due to handcuffing consisted of numbness, the Sixth Circuit refused to grant to the officers an exemption for review of their actions under Graham. The petitioners' argument illuminates their misconception that police enjoy a special right to handcuff except where precedent clearly indicates that it is not appropriate.

Finally, continued reliance upon the objective reasonableness standard places no greater burden on police. Police are currently constrained to weigh the reasonableness of their conduct in terms of the totality of circumstances. This means that since Graham they have been urged to take age and size into account when using force, just as they have been constrained to take other pre-existing conditions such as injury and mental capacity into account. See, e.g., Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994); Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993).

3. There is no per se right to handcuff during the course of an arrest.

Police officers do not enjoy a per se right to handcuffing. The Second Circuit has announced in clear terms that "although handcuffing will be the reasonable course in many, if not most arrest situations, we do not accept the principle that handcuffing is per se reasonable or that Graham v. O'Connor requires such a

conclusion." Soares, 8 F.3d at 921.[2] The Graham standard requires that the determination of whether a particular seizure is reasonable under the Fourth Amendment must proceed by carefully balancing "the nature and the quality of the intrusion on the individual's Fourth Amendment interests" against the opposing government interests. Graham, 490 U.S. at 396 (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

In the typical arrest situation, the use of handcuffs may be justified by the legitimate state interest in preventing flight and safety risks even if the suspect makes no actual attempt to flee. Soares, 8 F3d at 922. The instant case presents a different question because the use of handcuffs was not in the "ordinary course of an arrest." Id. Dramese never presented a valid safety risk to two grown, armed police officers, and he was clearly not a flight risk sitting quietly in the back of the police car. The "crowd" of children gathered in a field, ages three, five, and ten, were too young and too far away to pose any serious threat to the officers. (March 22, 1994, Dep. Dramese Fair) Thus, posing no legitimate flight or safety risk, the escalation of force in the form of handcuffs was not justified by any legitimate government interest. It was also unreasonable in light of the totality of circumstances presented to petitioners, including the plaintiff's age and the fact that the alleged crime consisted of a playground scuffle, which petitioners

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2. In Soares, a fisherman was arrested for violating a reporting regulation that required an accurate accounting of whether an individual fished in a certain year. The defendant government official approached Soares, informed him that he was under arrest for violating the pertinent regulation, placed handcuffs on him, and then walked him to the police cruiser and put him in the back seat. Upon arriving at the station, the handcuffs were removed, and Soares's wrists were bruised and slightly indented. The Second Circuit in Soares reversed the district court's denial of summary judgment on the grounds that the right of the adult plaintiff not to be routinely handcuffed during an arrest was not clearly established. Soares at 922. Similarly defendants here argue that Dramese has no clearly established right not to be handcuffed during a routine arrest.

knew did not result in an injury. Further, the officers decided to use handcuffs not because of Dramese's incident with the school girl, but because of an unrelated event – the alleged "fumbling through" a briefcase. (May 2, 1994, Dep. John Velleca)

Petitioners rely on Soares to support their contention that the police have a per se right to handcuffing. The holding in Soares does not support such an overreaching claim. Morevoer, critical factual differences exist, between Soares and the instant case. Soares was an adult, whereas Dramese was an eleven year-old boy. There was no warrant for Dramese's arrest, and, in fact, petitioners did not even inform or consider respondent to be under arrest. (March 22, 1994 Dep. Richardo Rodriguez; May 2, 1994 Dep. John Velleca.) Further, the handcuffs were placed on the plaintiff in Soares before he was detained in the police cruiser and were considered as part of the process of arrest. In this case, however, the police had detained Dramese inside the police cruiser, making the use of handcuffs unrelated to the process of arrest. Unlike the insignificant harm of bruises and indentations alleged in Soares, respondent here claims to have been terrified, and continues to this day to express anxiety and anger toward the police.

Respondents rely upon the law of probable cause to support their contention that the performance of a lawful arrest gives police officers broad and unchecked discretion to handcuff. See, e.g., United States v. Sharpe, 470 U.S. 675, 686-87 (1985) (stating that officers need not use most reasonable alternative in effecting arrest); United States v. Price, 599 F.2d 494, 498-99 (2d Cir. 1979) (stating that where grounds for probable cause are established "the maximum intrusion of custodial arrest is permissible"). However, the officers' probable cause to arrest Dramese is not disputed. Rather, petitioners rely upon the law of probable cause in order to avoid the application of the reasonableness test under Graham. The sanction to arrest with probable cause does not translate into permission to use excessive force to effect that arrest. Such an approach is plainly at odds with Graham.

Finally, petitioners demand that this Court ignore the law governing excessive force and adopt a rule conforming to the exigencies of police practice. The New Haven Police Department both before the alleged incident and since has failed to institute a

policy regulating the conduct of police officers who come into contact with juveniles generally, or specifically, with young children.

4. The police officers' application of force after the child had been subdued was objectively unreasonable and resulted in significant psychological injury due to the child's minority status.

The petitioners incorrectly argue that Dramese's psychological trauma does not constitute an "injury." This Court has recognized that childhood "is a time and condition of life when a person may be most susceptible to influence and to psychological damage." Eddings v. Oklahoma, 455 U.S. 104, 877 (1982). The special needs and capacities of juveniles must be taken into account when determining the reasonableness of the conduct of law enforcement. See Haley v. Ohio, 332 U.S. 596, 599-600 (1948) (noting "when . . . a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. . . . That which would leave a man cold and unimpressed can overawe and overwhelm a lad.") Further, in Schall v. Martin,467 U.S. 253 (1984) this Court warned against indiscriminately subjecting juveniles to the same enforcement conduct as adults:

> [T]he impressionability of juveniles may make the experience of incarceration more injurious to them than to adults; all too quickly juveniles subjugated to preventive detention come to see society at large as hostile and oppressive.

Schall, 467 U.S. at 291.

Following this rationale, lower courts have generally considered minority status to be a factor when evaluating either excessive force claims brought under the Eighth Amendment or when assessing the capacity of juveniles during suppression hearings. See e.g., Hewitt v. Jarrard, 786 F.2d 1080 (11th Cir. 1986) (holding that shoving of inmate considered grounds for claim of excessive force because inmate was juvenile); Bergren v.

City of Milwaukee, 811 F.2d 1139 (7th Cir. 1987) (juvenile status was considered by court when determining whether temporary incarceration without guardians present violated due process rights of juvenile suspect or was otherwise used to manipulate his diminished capacity).

Yet, petitioners continue to voice their concern that having to take the minority status of suspects into account will somehow impair the police's ability to make split-second decisions. It is far easier to discern in an instant, however, whether someone is a small, unarmed, slight eleven year old barefoot boy dressed in his pajamas than whether someone has an injury which might be aggravated by the use of force or whether someone has a mental disability. See e.g., Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994) (court held, in part, that officers should have considered that plaintiff was mildly mentally retarded); Walton, 995 F.2d at 1342 (court considered officers' failure to heed client's repeated claims of diabetes as well as obvious physical symptoms of diabetic distress).

Indeed, Dramese's increased vulnerability to emotional harm as a juvenile should be considered among the totality of circumstances under review in this case. Petitioners had the opportunity to leave Dramese at his home with his adult babysitter while they searched for his mother. Instead, they chose to place him in custody. Once locked in the back of the police cruiser, Dramese was unarmed, subdued, and unable to escape or to provide resistance. He did not pose a threat to himself or to others. Petitioners did not explain to or discuss with Dramese what would happen to him. Consequently, when they opened the rear door of the cruiser and handcuffed him, he believed that he was being taken to juvenile detention and that he would never see his mother again. (October 19, 1994, Video Tape Dep. Dramese Fair) He was terrified and began to cry. (March 22, 1994, Deposition of Dramese Fair) Nonetheless, petitioners persisted in their indifference to his well-being.

In this case, petitioners did not have to allow the scope of force to escalate beyond the amount used to detain Dramese in the police cruiser. In defense of their actions, petitioners have alleged that children gathered around the cruiser and that Dramese "fumbled through" a briefcase in the backseat. Respondent

disputes these allegations, but even assuming their accuracy, petitioners had less intrusive options available to them such as removing the briefcase, dispersing the alleged crowd of young children, or standing closer to the door of the police car. What must remain paramount in consideration of this case are the origins of this situation. It evolved as a result of an older brother hitting a bully with a stick because she struck his sister. It did not represent a heated, hostile or volatile and changing police crisis situation. While any and all police force must serve a legitimate state interest and remain proportional to the circumstances, the force exhibited here was clearly without justification in light of the investigatory purpose. Indeed, the use of handcuffs was excessive. Therefore, it could be argued that petitioners overreacted to this relatively minor incident by handcuffing Dramese either 1) because they falsely assumed that they could do anything to this little boy that they might ordinarily do to an adult; or 2) because they feared that if not handcuffed this "pajama-clad," eleven year-old, who once carried a stick somehow might overwhelm them.

Further, petitioners' argument that respondent's position requires the ambiguous situation in which an "officer must handcuff immediately or forego the opportunity unless circumstances invites frivolous claims based on wholly subjective disputes . . . ." is incorrect. The fact that police officers should exercise care when interacting with juveniles is not only practical but represents part of the police's responsibilities to the communities which they serve and protect. According to the petitioner's argument, the police should use one standard of care for all individuals which they arrest or detain. Police officers would not use <u>any</u> level of discretion when investigating a situation, but would instead respond to all situations with the maximum amount of force permitted. This approach risks forcing all juveniles to see the world as hostile and oppressive. <u>Schall</u>, 467 U.S. at 291. It also risks causing juveniles to lose respect for the police.

CONCLUSION

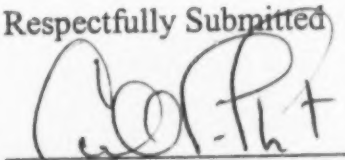
The assertion that the police would adopt one blanket policy towards juveniles is misleading. Indeed, for the level of force used by law enforcement often fails to correspond with the individual child but differs based on perceptions of particular neighborhoods. The petitioners would lead this Court to believe that New Haven Police customarily handcuff young school-age children during minor scuffles and then parade them throughout the neighborhood in pursuit of their mothers. This is simply not the case.

Finally, the correct bright-line under Fourth Amendment law is that when the suspect is fully subdued, no more force may be applied absent a change in circumstances. Allowing one level of intrusion to be justified by probable clause is plainly at odds with the objective reasonableness and totality circumstances approach articulated by this Court. Tennessee v. Garner, 471 U.S. 1 (1985); Graham, 490 U.S. at 396. Thus, if the claim is unclear or frivolous, it can be decided on a motion for summary judgement on the grounds of qualified immunity. However, the claim that there was no change in circumstances is not frivolous, or even ambiguous in this particular case. Dramese remained silent in the back seat of the police car -- weeping.

For the reasons stated above, the petition for certiorari should be denied.

Dated: June 10, 1998

Respectfully Submitted



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